No. 09-1575

IN THE

Supreme Court of the United States

RIVERVIEW HEALTH INSTITUTE LLC, ET AL.,
Petitioners,

v.

MEDICAL MUTUAL OF OHIO, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

(1) Whether the Sixth Circuit properly applied the test set forth in *U.S. Dept. of the Treasury v. Fabe*, 508 U.S. 491 (1993) and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982) in determining that the Ohio laws governing Petitioners' allegations that Respondents wrongly delayed, diminished, and denied payment of insurance claims were enacted for the purpose of regulating the "business of insurance."

-and-

(2) Whether the Sixth Circuit properly applied the test set forth in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999) in determining that Petitioners' claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, would impair Ohio's comprehensive regulatory scheme to regulate the business of insurance.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns 10 percent or more of the stock in Respondent Medical Mutual of Ohio.

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

The Petition does not even begin to present any question worthy of this Court's review. Indeed, the Petition fails to identify *any* new rule of law that this Court should impose. Rather, it quibbles with the Sixth Circuit's application of well-settled rules of law and urges this Court to more finely "parse" the allegations in the complaint. These types of questions are quintessentially ill-suited for this Court's review. S. Ct. R. 10.

Closer inspection of the questions presented by the Petition reveals further obstacles to review. Petitioners self-limit the scope of the first question to "insurance companies in the State of Ohio" (Pet. at i) – hardly a question of national significance. Indeed, they concede that this Court has repeatedly examined the "business of insurance" requirement set forth in the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), and they acknowledge that the Sixth Circuit relied on Supreme Court precedent when it determined that the "business of insurance" requirement was satisfied here. Petitioners simply do not care for the result.

Yet Petitioners' surprise at the outcome is difficult to square with their concession that the complaint actually pleads conduct that "comes within the 'business of insurance.'" (Pet. at 19). This concession reveals the fact-dependent nature of the inquiry they invite this Court to undertake. Even if the Court were nevertheless inclined to go down that path, its opinion would be one of limited utility – constrained to insurance companies in Ohio that have allegedly perpetrated a scheme almost identical to

the conduct alleged here. Understandably, Petitioners never had much confidence in this argument in the first place; they did not bother to raise it before the district court except by a passing reference in a footnote.

Petitioners' second question fares no better. The purported "circuit split" they depict is illusory. This Court set forth a standard for "impairment" under McCarran-Ferguson in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). The circuits (including the Sixth Circuit here) have applied the *Humana* test to varying fact patterns under several different state law insurance regimes. To the extent the ultimate outcomes differ, any such discrepancies can be traced to substantive differences in the laws of the respective States, the facts, and the application of those facts to the state laws presented. The Court need not take this case to compare and contrast Ohio's insurance regime with that of New Jersey or other states.

Moreover, this is the only case among those cited by Petitioners where the State itself submitted an *amicus* brief specifically positing that application of Petitioners' RICO allegations *would impair* Ohio's insurance regulations. The Sixth Circuit's interpretation of Ohio law is entitled to deference by this Court. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law.").

The Petition should be denied.

STATEMENT OF THE CASE

Factual Background

Respondent Medical Mutual of Ohio[1] ("Medical Mutual"), is a mutual company that underwrites and provides group and individual health insurance. Petitioners Riverview Health Institute, LLC, Middletown Surgical Associates, Inc., d/b/a/ The Surgical Weight Loss Center, and Oak Leaf Health Group LLC, d/b/a St. Elizabeth's Laboratories (collectively "Riverview"), are health-care providers of hospital, physician and laboratory services that provide surgical weight loss procedures to patients at a facility in Dayton, Ohio.

This case does not arise, however, from any direct relationship between Medical Mutual and Riverview. Rather, this case arises from the relationship between Medical Mutual and certain of its policyholders who allegedly assigned to Riverview their rights to receive benefits from Medical Mutual for medical services that Riverview provided.

Riverview had no direct "provider" relationship with Medical Mutual, meaning that Riverview operates "exclusively on an out-of-network basis." (Pet. App. 67a). Prior to performing any medical services for Medical Mutual policyholders, Riverview

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[1] Petitioners also named in their Complaint Respondents Kent W. Clapp, who is now deceased but at the time the Complaint was filed was Medical Mutual's Chairman, President and CEO, David Quiring, Medical Mutual's Vice President of Claims Operations, and Kathy Schneeberger, an employee in Medical Mutual's financial investigation unit. The Respondents are referred to collectively as "Medical Mutual" throughout this brief.

requires the insured patient to execute an "Assignment of Medical Benefits," which purports to assign to Riverview all of the insured's rights to receive benefit payments from Medical Mutual. (*Id.* at 67a-68a). The only contact between Riverview and Medical Mutual alleged in the Complaint is that Riverview conferred with representatives from Medical Mutual to ensure the proposed services would be covered by the patient-insured's out-of-network insurance coverage, and that from time to time, Medical Mutual and Riverview would negotiate and settle the amounts that Medical Mutual would pay for a given procedure. (*Id.* at 80a, 83a, 85a).

This dispute began in August 2006 when Medical Mutual notified Riverview that the Financial Investigations Department at Medical Mutual had performed a review of claims and clinical data that revealed systemic and fraudulent billing practices on the part of Riverview. (Pet. App. 71a). Riverview eventually responded by requesting more details regarding the claims that Medical Mutual alleged Riverview had improperly submitted. (*Id.* at 72a). Medical Mutual replied in January 2007 with a letter detailing the claims that Riverview had improperly submitted to Medical Mutual, causing Medical Mutual a loss of $796,692.41. (*Id.* at 72-73a).

In response, and in an effort to avoid Medical Mutual's claims for damages arising from Riverview's fraudulent claim submissions, Riverview launched a preemptive lawsuit purporting to assert three different federal RICO claims. To satisfy the predicate act requirement for its RICO claims, Riverview alleged that Medical Mutual "acted to delay, diminish and deny payment of the lawful

claims of patient-insureds as submitted by out-of-network health providers . . . through a scheme or artifice, utilizing the U.S. mail and demonstrating a specific intent to defraud the patient-insureds and out-of-network health providers . . . ." (Pet. App. 81a). Riverview also alleged that "as part of its regular way of doing business," Medical Mutual "violated provisions of Ohio's 'Prompt Pay Act' (O.R.C. § 3901.381, et seq.), utilizing the mails and demonstrating a specific intent to defraud patient-insureds and out-of-network providers." (*Id.* at 82a). For each RICO claim, Riverview based its alleged standing to recover damages solely on its status as an assignee of the medical insurance benefits resulting from the "Assignment of Medical Benefits" Riverview required its patient-insureds to execute. (*Id.* at 93a-95a).

Medical Mutual moved to dismiss the RICO claims on a two-fold basis: (1) pursuant to the McCarran-Ferguson Act, the RICO allegations were reverse preempted by Ohio laws regulating the business of insurance; and (2) the Complaint failed to adequately plead the required elements of RICO (an argument never reached by the district court). As the Sixth Circuit succinctly explained: "Reverse preemption is a form of inverse preemption that prevents a generally applicable federal law from inadvertently invalidating, impairing, or superseding state laws enacted to regulate the business of insurance." (Pet. App. 6a).

In its opposition brief, Riverview addressed the "business of insurance" requirement of McCarran-Ferguson (which underlies the first question now advanced in its Petition) only in a footnote, asserting

merely that "payment agreements with the patients, because they do not deal with the spread of risk, are not the 'business of insurance . . . .'" (Dist. Ct. Doc. 11 at 6 n.5).[2] The balance of its argument focused on the "impairment" prong of McCarran-Ferguson.

The district court dismissed Riverview's RICO claims as reverse preempted under the McCarran-Ferguson Act. (Pet. App. 47a). On appeal, the Sixth Circuit panel unanimously affirmed. (*Id.* at 33a).

Before the Sixth Circuit, Riverview tried to retreat from the fact that its RICO claims explicitly rested on its status "as the assignees of the patient-insureds." (Pet. App. 93a-95a). Contrary to its Complaint, Riverview argued for the first time that it was relying "in substantial part" upon its own relationship with Medical Mutual and was seeking to enforce its own rights, as opposed to those of the patient-insureds. (Riverview Sixth Cir. Br. at 19). The Sixth Circuit was unpersuaded by this recasting, finding that Riverview's Complaint "focuse[d] on the idea that Medical Mutual 'acted to delay, diminish and deny payment of ... lawful claims of patient insureds as submitted by out-of-network health providers ... through a scheme or artifice, utilizing the U.S. Mail and demonstrating a specific intent to defraud the patient-insureds and out-of-network health-care providers.'" (Pet. App. 14a). Relying on *Pireno* and

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[2] Filings in the district court case, *Riverview Health Inst. et al. v. Medical Mutual of Ohio, et al.*, Case No. 3:07 CV 354 (S.D. Ohio), are available on PACER at https://ecf.ohsd.uscourts.gov/cgi-bin/login.pl. With the exception of the Complaint, references in this Opposition to district court filings will be by docket entry number.

Fabe, the Sixth Circuit accordingly found that Riverview's allegations "relate to the actual performance of the insurance contract between Medical Mutual and its insureds, thus satisfying all three prongs of the *Pireno* test." (*Id.*).

Having found the business of insurance requirement satisfied, the Sixth Circuit analyzed each of the seven factors identified in *Humana* and found, as the district court did, that Riverview's RICO claims would impair Ohio's insurance regulatory scheme and were therefore reverse preempted by McCarran-Ferguson. (Pet. App. 18a-24a). After carefully reviewing Ohio's comprehensive scheme for regulating the processing of insurance claims set forth in the Ohio Prompt Pay Act, the court found that each of the *Humana* factors weighed in favor of preemption:

> We conclude that application of federal RICO in this case would impair Ohio's insurance regulatory scheme. The conduct at the heart of Plaintiffs' complaint implicates Ohio's law regarding payment of claims and the Ohio Department of Insurance is charged with administering the applicable state law. In this case, Plaintiffs have no common law remedy or private right of action. The state RICO statute is inapplicable and the damages available pursuant to federal RICO would far exceed the damages contemplated by the Ohio legislature when enacting its insurance regulatory scheme. Moreover, the State of Ohio has filed a brief as *amicus curiae* in support of Defendants, arguing that the imposition of the federal RICO statute will impair Ohio's ability to detect insurance fraud

> and reverse preemption will not prevent insurers from using state or federal RICO to combat fraud. Accordingly, Plaintiffs' RICO claims are reverse preempted by the McCarran-Ferguson Act and we, therefore, affirm the district court's dismissal of Plaintiffs' RICO claims.

(Pet. App. 23a-24a).

Statutory Framework

The McCarran-Ferguson Act was enacted "to restore the supremacy of the States in the realm of insurance regulation." *Fabe*, 508 U.S. at 500. Accordingly, the Act "precludes application of a federal statute in face of state law 'enacted ... for the purpose of regulating the business of insurance,' if the federal measure does not 'specifically relate to the business of insurance,' and would 'invalidate, impair, or supersede' the State's law." *Humana*, 525 U.S. at 307 (citing *Fabe*, 508 U.S. 491).

Prior to *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944), the issuance of policy insurance was not considered a transaction in interstate commerce subject to federal regulation and, therefore, "the States enjoyed a virtually exclusive domain over the insurance industry." *Fabe*, 508 U.S. at 499 (citing *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978)). In *South-Eastern Underwriters*, however, the Court held that insurance companies that conducted substantial business across state lines were engaged in interstate commerce and were thus subject to federal antitrust laws. This holding was widely considered to be a threat to state regulation of the insurance industry, and within a year of the decision,

Congress enacted the McCarran-Ferguson Act. *See Fabe*, 508 U.S. at 499-500.

To accomplish its primary purpose to preserve state regulation of the activities of insurance companies,[3] McCarran-Ferguson provides for reverse preemption by state laws regulating the business of insurance. The tripartite test for determining whether a federal statute is reverse preempted by state law is well established. The threshold question is whether the federal statute at issue "specifically relates to the business of insurance." *Humana*, 525 U.S. at 307 (citing *Fabe*, 508 U.S. at 501). If not, two questions remain that, if answered in the *affirmative*, compel the conclusion that the federal law at issue is preempted by state law: (1) whether the state law was "enacted . . . for the purpose of regulating the business of insurance," and (2) whether the federal law would "invalidate, impair, or supersede the State's law." *Id.* Riverview does not dispute that RICO does not "specifically relate" to the business of insurance, and thus its Petition focuses upon the two remaining questions.

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[3] Congress made clear this purpose in the first section of the Act:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit Properly Followed and Applied this Court's Precedents Concerning The "Business of Insurance" Test.

As acknowledged by Riverview, this Court has repeatedly addressed the "business of insurance" element of McCarran-Ferguson. (Pet. at 4 (collecting cases)). With the test well-established, and having no rule of law to offer in its stead, Riverview seeks to distort the Sixth Circuit's opinion so as to imbue its question presented with greater importance.

Riverview's assertions that "[t]he Sixth Circuit did not follow *Pireno* and related cases, posing a conflict" (Pet. at 17), and that the Sixth Circuit "relied exclusively" on *Fabe* (*id.* at 6), are impossible to reconcile with the Sixth Circuit's quotation of and reliance upon the *Pireno* test. (Pet. App. 12a). The Sixth Circuit conducted its analysis of the business of insurance requirement by: (a) quoting *Pireno* as "articulat[ing] three criteria that determine whether an activity is part of the 'business of insurance,'" (b) citing each of those criteria, and (c) concluding its discussion of the matter by holding that Riverview's "allegations relate to the actual performance of the insurance contract between Medical Mutual and its insureds, thus satisfying all three prongs of the *Pireno* test." (Pet. App. 12a-14a). Far from ignoring or rejecting *Pireno*, the Sixth Circuit determined that, under the facts alleged, the *Pireno* test was satisfied.

The same test that the Sixth Circuit applied (Pet. App. 12a) is the test urged by Riverview. (Pet. at 18). Because the Sixth Circuit applied the test that Riverview requests, any quarrel by Riverview is

limited to the application of that test. "Misapplication" questions are rarely of interest to this Court. S. Ct. R. 10.

But even calling this a misapplication question lends too much credit to the Petition in light of Riverview's concession that the Complaint alleges conduct on the part of Medical Mutual that "comes within the 'business of insurance.'" (Pet. at 19). In the face of this admission, particularly when juxtaposed with the Sixth Circuit's application of the legal test requested by Riverview, Riverview's grievance is further delimited to a simple point: "the Sixth Circuit failed to parse" the Complaint sufficiently. (*Id.*). It is axiomatic that it is not the role of this Court, the Sixth Circuit, or a district court to "parse" a RICO complaint for isolated references that might rehabilitate a facially deficient claim. Petitioners neglected to undertake this task before the district court, and their effort to do so at the Sixth Circuit was too late in the process. In any event, the Sixth Circuit's review of the complaint revealed that the "conduct at the heart of Plaintiff's complaint" fell clearly within the business of insurance. (Pet. App. 23a).

Any "pars[ing]" exercise by this Court would neither contribute anything meaningful to the body of law interpreting McCarran-Ferguson, nor save Riverview's RICO claims. To illustrate the point, out of its entire 104-paragraph Complaint, Riverview identifies just six paragraphs supposedly containing allegations outside the business of insurance. (Pet. at 19). Burying a handful of allegations among many others that point in the opposite direction cannot salvage Riverview's Complaint.

Regardless, the allegations to which Riverview now clings do not withstand scrutiny. Specifically, Riverview claims that it alleged fraud incident to direct agreements it had with Medical Mutual, as well as fraud committed by Medical Mutual in its capacity as an insurance claims administrator. (*Id.*). Whether such conduct falls outside the business of insurance is immaterial, however, because Riverview expressly staked its right to recover damages for each of its three RICO claims on its alleged status "as the assignees of the patient-insureds who were injured in their business and property as a result of" Medical Mutual's alleged conduct. (Pet. App. 93a-95a). It is beyond serious dispute that payment (or alleged non-payment) of the patient-insureds' medical benefits by Medical Mutual constitutes the "business of insurance." That is why this issue merited only a conclusory footnote from Riverview before the district court. (Dist. Ct. Doc. 11 at 6 n.5).

Riverview accuses the Sixth Circuit of "wrongly rely[ing] on an impermissibly expansive reading of this Court's majority opinion in . . . *Fabe* . . . so as to bar any application of RICO to insurance companies in the State of Ohio[.]" (Pet. at *i*). That is simply not true. The Sixth Circuit specifically and properly applied *Fabe* and *Pireno* to the RICO allegations in this case and found Riverview's RICO claims fall within the business of insurance: "Plaintiffs contend that their federal RICO claims do not fall within the ambit of the 'business of insurance' requirement for reverse preemption. We disagree." (Pet at 12a). The Sixth Circuit's decision is fact-dependent and does not purport to "bar any application of RICO to insurance companies in the State of Ohio," as

suggested by Petitioners in the first question. (Pet. at i).

The first question presented is limited to insurance companies operating in Ohio, does not present any legal issue for this Court to resolve, and turns on the specific facts alleged. It simply does not meet the high standard for *certiorari*.

II. The Test Set Forth In *Humana* Is Followed By Every Circuit.

Suffering from the same flaw as the first question presented, Riverview's second question does not ask this Court to issue any new rule of law. Instead, it simply poses another misapplication question. Moreover, this misapplication question is one steeped in state law, and ill-suited for this Court's review.

As Riverview points out, this Court, in *Humana*, established the "proper test" for determining when a federal law is reverse preempted for impairing a state law enacted to regulate the business of insurance. (Pet. at 8). In analyzing whether the RICO allegations in *Humana* would impair the Nevada statutory scheme at issue in that case, the Court made clear that the impairment test is an *as applied balancing test* that involves a consideration of seven factors. *See Humana*, 525 U.S. at 303 ("We hold that RICO *can be applied in this case* in harmony with the State's regulation."); *id.* at 303-04 (analyzing the specific factual allegations in the complaint); *id.* at 311 ("Applying the standard just announced *to the facts of this case* ...."); *id.* (analyzing Nevada's specific statutory and common law remedies); *id.* at 313 ("In sum, we see no frustration of state policy in the RICO litigation *at issue here*.") (emphasis supplied as to all).

The Sixth Circuit balanced each of the *Humana* factors and determined that Riverview's RICO claims would impair Ohio's particular statutory scheme for regulating the business of insurance. (Pet. App. 24a). Riverview's suggestion that the Sixth Circuit failed to apply *Humana*, (Pet. at 11, 22), is incorrect: the Sixth Circuit cited the *Humana* factors and then analyzed each of them over the course of several pages in its opinion.[4] (Pet. App. 18a-24a).

In light of the nature of this balancing test, it is no wonder that Riverview's circuit split proves illusory. Riverview posits a circuit split with the Third, Fourth, and Tenth Circuits supposedly following *Humana* by permitting application of RICO to insurance fraud, and the Sixth and Eighth Circuit that allegedly show less fidelity to *Humana*. Each of these cases, however, examined different state insurance schemes through the lens of *Humana*. *See Riverview Health Institute, LLC v. Medical Mutual of Ohio*, 601 F.3d 505 (6th Cir. 2010) (Ohio); *Weiss v. First Unum Life Ins. Co.*, 482 F.3d 254 (3d Cir. 2007) (New Jersey); *American Chiro. v. Trigon Healthcare*, 367 F.3d 212 (4th Cir. 2004) (Virginia); *Bancoklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089 (10th Cir. 1999) (Missouri); *LaBarre v. Credit Acceptance Corp.*, 175 F.3d 640 (8th Cir. 1999) (Minnesota). That courts analyzing the laws of

[4] For similar reasons, Riverview's suggestion that the Sixth Circuit went astray by relying upon *Kenty v. Bank One, Columbus, N.A.* 92 F.3d 384 (6th Cir. 1996) is unavailing. First, Riverview never argued below that *Humana* overruled *Kenty*. (Pet. at 11 n.15). Second, in the course of the Sixth Circuit's application of the *Humana* factors, it *never* cites *Kenty*. (Pet. App. 19a-24a).

different states might come to different conclusions as to whether particular RICO allegations would impair state law is hardly surprising. Indeed, that was the result preordained by *Humana*'s balancing test.

None of the federal circuits has described these cases as being a split. In fact, Riverview's featured case, *Weiss*, properly attributed the different outcomes in these cases to variances in the laws of the different states at issue: "[W]e find nothing in cases from other Courts of Appeals dealing with different state schemes governing insurers that would cause us to alter our view in this case." 482 F.3d at 268. After surveying those cases and the respective state laws, *Weiss* contrasted them with New Jersey law: "We do not find that true of New Jersey." *Id.* at 269.

A review of the *Humana* factors (made with reference to *Weiss*) reveals both the absence of any circuit split as well as how dependent Riverview's question is on the vagaries of state law.

A. Presence or Absence of the State's Position

A central distinction between the cases cited by Riverview and the decision below is the position taken by the State of Ohio in this case. The State of Ohio, through its Attorney General, submitted an *amicus* brief at the Sixth Circuit supporting Medical Mutual's position. As the State of Ohio explained, the State's Department of Insurance is the "regulator of the insurance industry in the State of Ohio . . . ." (Ohio Amicus Br. at 1). The Department of Insurance has "enacted extensive rules, regulations and orders, including specific regulations governing prompt

payment to providers and prohibiting unfair claims practices." (*Id.* at 6). Between state statutes and these regulations, Ohio "has a unique and complete set of standards that govern the business of insurance. . . ." (*Id.*). Allowing Riverview to assert RICO claims for the same conduct covered by Ohio statutes and remedies "would impair Ohio's regulation of the business of insurance." (*Id.* at 7). The State of Ohio concluded that allowing Riverview's RICO claim would also frustrate the Department of Insurance's ability to combat insurance fraud. (*Id.* at 11). Recognizing that this *amicus* brief is both fatal to its Petition and fatal to the *Humana* analysis, Riverview resorts to simply attacking the integrity of the Attorney General's office. Regardless, this factor distinguishes the case below from all of the cases cited by Riverview – in none of those cases did the State appear and articulate its position on impairment. This is yet another example of how this case differs factually from the others highlighted by Riverview.

B. Statutory Right of Private Action and Common Law Remedies.

Unlike the Nevada regime at issue in *Humana*, the New Jersey regime at issue in *Weiss* and the Ohio regime at issue here do not allow for a private right of action under their respective statutory regimes. *See Weiss*, 482 F.3d at 264; (Pet. App. 19a). While it is true that Nevada, New Jersey, and Ohio all allow common law claims to work in tandem with their respective statutory schemes, the Petition ignores an important feature that distinguishes this case from *Weiss* and *Humana*: the Sixth Circuit expressly found that based on the facts of this case, under Ohio law,

Riverview had "no common law remedies available, which renders Ohio's Prompt Pay Act [Riverview's] exclusive source of remedies." (Pet. App. 19a).

Riverview's disagreement with the Sixth Circuit's determination that Riverview had no viable fraud or bad faith claims under Ohio law does not mean that the Sixth Circuit transgressed *Humana* or created a circuit split. The Sixth Circuit simply interpreted state law and found that Riverview could not state a claim.

Moreover, to even challenge the Sixth Circuit's determination, Riverview is forced to take divergent positions, simultaneously disclaiming and relying on its alleged status as assignee of Medical Mutual's insureds. On one side, Riverview argues that the business of insurance requirement is not satisfied because it brought claims on its own behalf, apart from its alleged status as assignee of the patient-insureds (Pet. at 5). On the other, Riverview argues the impairment arm of the McCarran-Ferguson test is not satisfied because Riverview "sued Respondents on the basis of full assignments from the insureds" and therefore had the same right as the insureds to sue for fraud and bad faith. (Pet. at 24). Riverview simply cannot have it both ways.

C. Other State Laws

Citing both *Weiss* and *Humana*, the Sixth Circuit examined whether other state statutes might provide the basis for the suit. (Pet. App. 21a). Specifically, at Riverview's invitation, the court analyzed whether Ohio's RICO statute—even though Riverview did *not* assert such a claim—would theoretically apply to this case. The Sixth Circuit held that it would not, noting that Ohio's Prompt Pay Act, which Riverview

specifically alleged Medical Mutual had violated, (Pet. App. 82a), was not a corrupt activity under Ohio's RICO statute. In contrast, the *Weiss* court specifically found that the claims alleged in that case would likely be covered by New Jersey's Consumer Fraud Act. *Weiss*, 482 F.3d at 266. In other words, the Third Circuit in *Weiss*, and the Sixth Circuit here, applied the same test—whether other state laws provided grounds for suit—to different conduct and different state laws, and came to different conclusions. This is not a conflict.

D. Damages

In Nevada, as noted by this Court in *Humana*, punitive damages are expressly available for insurance fraud claims and, in fact, "plaintiffs seeking relief under Nevada law may be eligible for damages exceeding the treble damages available under RICO." *Humana*, 525 U.S. at 313. In *Weiss*, the Third Circuit likewise held that it was at least possible that a "racketeering scheme by an insurer" could warrant punitive damages under New Jersey law. *See Weiss*, 482 F.3d at 267. In this case, however, the Sixth Circuit expressly determined that punitive damages were unavailable to Riverview because it lacked a viable fraud or bad faith claim and, therefore, treble damages under RICO "would greatly exceed" the damages available to Riverview under Ohio law. (Pet. App. 22a). The Petition simply disputes this interpretation of Ohio law when it argues punitive damages are available in Ohio for bad faith and fraud claims.

E. Reliance by State Insurers

Finally, Riverview once again ignores the actual Sixth Circuit opinion and argues that prohibiting

insurers in Ohio from bringing RICO claims to combat insurance fraud would contravene Ohio's regime for regulating the business of insurance. (Pet. at 27). In fact, the Sixth Circuit determined just the opposite. Unlike *Weiss*, in which the court "assumed" the preemption of the plaintiffs RICO claims "would deprive insurers of an important weapon of self-defense," *Weiss*, 482 F.3d at 267, the Sixth Circuit examined Ohio's regulatory scheme and determined that insurers would "still have a cause of action under both Ohio and federal RICO for fraud perpetrated against them by insureds." (Pet. App. 23a).

* * *

Riverview's second question does not present an issue worthy of this Court's review because: (1) there is no proposed rule of law for the Court to recognize; (2) the Sixth Circuit properly applied this Court's existing precedent; (3) there is no circuit split; (4) the case hinges on factual distinctions that would render it of limited utility in future cases; and (5) resolving this question would require this Court to interpret and construe Ohio, rather than federal, law.

CONCLUSION

For all of the foregoing reasons, the Petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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